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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/750,402	12/31/2003	Paul T. Van Gompel	19,577	8997

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EXAMINER

CHAPMAN, GINGER T

ART UNIT PAPER NUMBER

3761

DATE MAILED: 11/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/750,402

Applicant(s)

VAN GOMPEL ET AL.

Examiner

Ginger T Chapman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
 - If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
 - If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
 - Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-51 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-51 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 10/7/2004.
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date. ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: ____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 2, 5, 7-10, 12, 14, 15, 17, 24-26, 28, 30, 31, 33-35, 38, 40-43, 45, 47, 48, 50 and 51 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 5,037,416 issued to Allen et al.

As depicted in Figures 5 and 7, Allen et al disclose a disposable garment which includes a liquid impermeable outer layer which may be pleated (col. 4, line 48); an absorbent core which may be joined to the outer layer (col. 3, line 65); a liquid permeable inner layer (12) which is elastic in the lateral (col. 7, lines 5-6) and longitudinal (col. 4, lines 19-24) directions and further having a perimeter (22, 24, 50; col. 2, lines 66-68). The elastic inner layer defines an opening located in an internal position to the elastic inner layer which may be constructed of two or more layers of material (col. 6, lines 27-28) and have zones of differing elastic properties (col. 13, line 41). The outer layer length is greater than the inner layer length in the longitudinal direction (col. 13, lines 14-15) and the inner and outer layers may be at least partially joined at their perimeters using ultrasonic, heat/pressure or adhesive in a variety of bonding patterns (col. 4, lines 51-52).

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 3, 4, 19-23, 36 and 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allen as applied to claim 1 above, and further in view of U.S. Patent No. 4,756,709 issued to Stevens.

Allen et al disclose a disposable garment having an elastic inner layer but fail to address a stretchable outer layer. As best depicted in Figures 14 and 19, Stevens teaches a disposable garment wherein the outer cover (20) is resiliently stretchable in the longitudinal and lateral directions (71, 73,) and laterally extensible (80, 82) thereby enhancing the ability of the garment to conform to the anatomy of the wearer while the wearer engages in various activities and positions. It would therefore be obvious to one of ordinary skill in the art at the time of invention to construct the diaper of Allen with a stretchable outer layer as taught by Stevens to produce a diaper providing an improved fit to the wearer of the garment.

Claims 6, 11, 13, 18, 27, 29, 39, 44 and 46 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allen as applied to claim 1 above, and further in view of U.S. Patent No. 5,817,086 issued to Kling.

Allen et al disclose the use of inner and outer layers having two or more layers or laminae of materials. Allen fails to teach the use of liquid impermeable inner layers or liquid permeable outer layers in an absorbent garment such as a diaper. However, it is well known in the diaper

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art that "layer" when used in the singular can have the dual meaning of a single element or a plurality of elements.

Kling discloses the use of layers having a plurality of elements. In particular, Kling teaches an absorbent garment having an outer layer (Figure 1: (5)), an inner layer (2) with a large opening (17) and an absorbent assembly (4) which may be joined to the outer layer with the inner and outer layers joined at their perimeters (6, 7, 8, 9). The outer layer consists of a laminate of materials such as, for example, polyethylene or polypropylene with a liquid permeable fiber fabric. The bottom layer can also comprise a laminate having a thermoplastic layer and a fiber fabric, or a fiber fabric extrusion coated with a plastic film wherein the liquid permeable fiber fabric is placed outermost so that the diaper is given a textile look (col. 3, lines 60-68) thereby providing a pleasing cloth-like appearance and feel to the user.

Therefore, to have constructed the outer layer of the diaper of Allen with the liquid permeable fiber fabric placed outermost as taught by Kling to provide a pleasing cloth-like feel and appearance for the user of the garment would have been obvious to one of ordinary skill in the art at the time the invention was made.

As best depicted in Figures 3 and 4, Kling further teaches a liquid impermeable inner layer (2) having a large opening (17) for receiving urine and permitting the passage of liquid through the opening of the inner layer (col. 8, lines 44-51) to the absorbent assembly while maintaining a dry feel to the surface of the inner layer in contact with the skin of the wearer thus reducing skin irritation or "diaper rash." It would be obvious to one of ordinary skill in the art at the time of invention to construct the inner layer and opening of Allen with a liquid impermeable

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material as taught by Kling to provide a dry skin-contacting surface to the wearer to reduce skin irritation.

Kling and Allen teach that the size of the opening defined by the inner layer is a balance between the size necessary to accommodate variations of the anatomy of the wearer within the size interval of the wearer for which the diaper is dimensioned while minimizing undue skin contact with waste materials (Allen: col. 12, lines 33-37; Kling: col. 5, lines 9-11). Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have constructed the inner layer with an opening having a length of 10-80% of the total length of the garment, particularly since Kling teaches the general conditions of the opening, discovering optimum or workable size ranges involves only routine skill in the art.

Claims 16, 32 and 49 are rejected under 35 U.S.C. 103(a) as being unpatentable over Allen as applied to claim 1 above, and further in view of U.S. Patent No. 5,269,775 issued to Freeland et al.

Allen discloses a disposable garment wherein the outer layer length is greater than the inner layer length in the longitudinal direction (col. 13, lines 14-15) thereby creating a void space for isolating waste material between the layers. Allen fails to teach an outer layer lateral width that is greater than the lateral width of the inner layer. Freeland et al teach an elastic inner layer for a disposable garment wherein the garment outer layer has a greater width in both the lateral (col. 5, lines 2-4) and longitudinal (col. 4, lines 62-63) directions thereby providing a void space while additionally providing for shaping of the article and a snug inner layer fit while the garment is worn. It would therefore be obvious having ordinary skill in the art at the time the invention was made to construct the garment of Allen with an outer layer having a greater width

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in the lateral direction as taught by Freeland to provide a more comfortable fit to the wearer while the garment is in use.

Conclusion

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. U.S. Patent Nos. 4,710,187 issued to Boland et al ; 4,731,066 issued to Korpman; 6,120,485 issued to Gustafsson et al and 6,679,869 issued to Schlinz et al all disclose dual layer disposable garments having elastic and stretch characteristics.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Ginger T Chapman whose telephone number is (703) 305-0471. The examiner can normally be reached on Monday through Friday 8:30 a.m. to 5:00 p.m..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Larry Schwartz can be reached on (703) 308-1412. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Ginger Chapman
Examiner, Art Unit 3761




Larry I. Schwartz
Supervisory Patent Examiner
Group 3700

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Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-51 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-46 of copending Application No. 10/749,761. Although the conflicting claims are not identical, they are not patentably distinct from each other because the claims of each application describe and claim substantially identical dual layer garments and are coextensive in scope.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.